1992

Robert Berrett v. Denver and Rio Grande Western Railroad : Petition for Writ of Certiorari

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

White 3

IN THE UTAH SUPREME COURT

ROBERT BERRETT, et al., Plaintiffs/Respondents, vs. DENVER & RIO GRANDE WESTERN RAILROAD, Defendant/Petitioner.	Supreme Court No. 920223 Court of Appeals No. 910215-CA Priority No. 16

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REVIEW FROM A DECISION AND JUDGMENT OF THE UTAH COURT OF APPEALS

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QUESTIONS PRESENTED

Petitioner, The Denver & Rio Grande Western Railroad, requests the Supreme Court to exercise its power of supervision to review two issues:

1. Is a trial court's discretion in making a case management decision to exclude evidence limited to cases of "possible contempt" under Utah R.Civ.P. 26 and 37, as the Court of Appeals held, rather than governed by the broader standards of Utah R.Civ.P. 16 and the trial courts' inherent powers?

2. Where there is no proffer of evidence excluded by a trial court case management ruling, is the burden on the objecting party, as the Court of Appeals' decision requires, (rather than on the proponent of the evidence) to establish what effect the evidence may have had on the result at trial?

OFFICIAL REPORT OF THE COURT OF APPEALS

The official decision of the Utah Court of Appeals (the "Opinion") issued on April 3, 1992. It was published at 184 Utah Adv. Rep. 49 (4/21/92). A copy is attached as Appendix 1.

JURISDICTION

A. On April 3, 1992, the Utah Court of Appeals decision was filed.

B. No orders concerning a rehearing or extensions of time within which to petition for certiorari have been requested or made.

C. Petitioner believes the respondents do not intend to file a cross-petition.

D. The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. §§ 78-2-2(3)(a) and (5)(1992).

CONTROLLING PROVISIONS

Rule 16(d), Utah Rules of Civil Procedure:

> If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanctions, the court shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Rule 61, Utah Rules of Civil Procedure:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 103(a), Utah Rules of Evidence:

Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

STATEMENT OF THE CASE

In this action, the plaintiffs/respondents, landowners of the former town of Thistle, Utah (the "Landowners"), alleged that petitioner The Denver Rio Grande Western Railroad (the "Railroad"), through activities on its right-of-way at the base of an ancient landslide, caused that landslide to become activated, to move across the canyon below the Landowners' property and to cause flood damage to the Landowners. (Third Amended Complaint, R. 872).[1] Following trial from August 14 to 29, 1989,[2] the jury rendered a special verdict in favor of the Railroad and the Landowners appealed to the Utah Court of Appeals. (R. 1387, 1514.) By a 2 to 1 decision, the Court of Appeals reversed the result, finding that the trial court abused its discretion and committed prejudicial error in excluding testimony from an expert witness first identified by the Landowners fourteen days before trial. (Op. 9.)[3] The Court of Appeals remanded the action for a new trial. (Op. 12.)

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[1] "R." refers to the Record on Appeal. "Op." refers to the Court of Appeals' opinion. Page references immediately follow.

[2] The Landowners filed this action in March 1986. Initially, trial was set for August 10, 1987; later this date was continued to February 21, 1989 and finally to August 14, 1989. (Op. 2.)

[3] Judge Jackson's dissent, while expressing doubt whether the trial court had abused its discretion, stated that judgment should be affirmed because the Landowners failed to establish prejudicial error through a proffer of the expert's testimony. Judge Jackson rejected the majority's assertion that the Railroad had the burden to show the absence of prejudice. (Op. 13-15.)

1. Introduction. The Court of Appeals reversed the result of a two-week trial, not because of any error at trial, but because of the pretrial exclusion of a late-named expert witness whose testimony is unknown to this day. In so reversing, the court erroneously (a) characterized the trial court's case management decision as a "discovery ruling," and (b) relieved the Landowners of any obligation to proffer the excluded testimony. This decision so departs from the accepted and usual course of judicial proceedings that this Court should exercise its power of supervision to reinstate the jury's verdict and affirm the trial court's Judgment. Utah R.App.P. 46(c).

2. Failure to Disclose Final Witness List. A June 23, 1989, letter to the Landowners from the Railroad recounted the Railroad's difficulties in obtaining a "final" witness list. (R. 748 [Appendix 2 hereto].) At a June 27, 1989, pretrial hearing to discuss final preparation for the August 14, 1989, trial, the Railroad advised the trial court that, while it had received on the previous Friday a list of twenty-five new witnesses proposed by the Landowners (in addition to thirty-two witnesses previously identified),[4] the Landowners had failed to provide the Railroad with their final witness list. (Appendix 2 and R. 1543, pp. 6-8.)[5] The Railroad requested that the Landowners be

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[4] See draft pretrial order, attached to Appellants' Brief as Appendix B.

[5] R. 1543 is the transcript of the June 27, 1989, hearing and is provided at Appendix 3.

required to provide "a clear statement of who [they were] really going to call as witnesses so [the Railroad could] take whatever additional discovery might be appropriate. . . ." (Appendix 3, p. 8.)

The trial court inquired about disclosure of a final witness list. (Appendix 3, pp. 28-29.) When the Landowners' counsel announced that he needed forty days to contact the witnesses disclosed the previous Friday, the trial court responded: "You've got to talk to them a lot sooner than that, Mr. Young. I say, you'd better find out and talk to them within the next ten or fifteen days." (Appendix 3, p. 28.) The trial court then denied the Landowners' motion to continue of the trial. (Appendix 3, p. 28.) Finally, the trial court warned all counsel that each was "entitled to know who it is you are legitimately going to call. [S]o that you don't end up in surprises." (Appendix 3, p. 28.) Absent timely disclosure, "the only thing [the court] can do is to make an order they cannot be permitted to testify." (Appendix 3, pp. 28-29.) To accomplish this disclosure, the trial court directed the parties to agree on a form of pretrial order (which would contain a list of proposed witnesses) within ten days. (Appendix 3, pp. 25-26.) July 7, 1989, the ten-day deadline set by the trial court, came and went without the filing of such an order. (Op. 2.)

3. The Landowners' Witness List. On July 12, 1989, still facing a potential fifty-seven witnesses, the Railroad again sent a letter (the "July 12 Letter") to the Landowners

requesting a "final" witness list. (Appellants' Brief, Appendix B.) The July 12 Letter asked for disclosure by August 1, 1989. Not until six days later, on July 19 or 20, 1989, did the Landowners finally commence an effort to locate (among other people) Dr. Shroder, a geologist who in 1967 had written about the Thistle slide. (R. 1551, p. 18.)[6]

Then, on August 1, 1989, two weeks before trial, the Landowners telecopied to the Railroad yet another witness list identifying seventy-eight new witnesses--five (including Dr. Shroder) to appear by live testimony and seventy-three to appear by deposition. (R. 1010.)[7] The Railroad immediately filed a motion to strike each of the new witnesses. (Op. p. 3; R. 1010 and 1013 [Appendix 5].)

4. The August 3, 1989, Hearing and Exclusion Ruling. At the August 3, 1989, hearing on the Railroad's motion to strike, counsel for the Landowners acknowledged the following:

a. The Landowners had access to the papers of Dr. Shroder and had known his name "for a long time." (Appendix 4, pp. 28-29.)

b. Having devoted his time and efforts to another case and having delegated trial preparation to another attorney, counsel for the Landowners "went to work on this case" only in July "because I was not ready. . . ." (Appendix 4, p. 13; Appendix 3, pp. 9, 15.)

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[6] R. 1551 is the transcript of the crucial August 3, 1989, hearing, a copy of which is attached as Appendix 4.

[7] This brought the total number of witnesses that the Landowners had identified to 135--with 103 being named in the last six weeks before a scheduled two-week jury trial. (Appendix 3, pp. 24-25.)

c. Counsel had only commenced his efforts to contact Dr. Shroder around "July 19th or 20th." (Appendix 4, p. 18.)

d. Dr. Shroder, in response to counsel's late July inquiries, had "made some preliminary conclusions," which counsel declined to disclose as being "work product," but represented to be "very beneficial" and "very helpful" to the Landowners' position. (Appendix 4, p. 19.)

e. "I don't honestly know the bottom line of all of [Dr. Shroder's] testimony. * * * [I]f his conclusions are reinforced . . . by the depositions and things I've now sent him, then I would definitely want to call him as a witness." (Appendix 4, pp. 29 and 19.)

f. The August 1, 1989, list was still a "possibl[e] list" and not final. (Appendix 4, pp. 13 and 22.)

At the close of the August 3 hearing the trial court noted that, on June 27, it had "made an order, directed from the bench," requiring submission of a pretrial order with the expected witness list within ten days of that date. (Appendix 4, p. 23.) Consistent with that "order," the trial court ruled that (a) persons not disclosed as witnesses by July 11, 1989,[8] could not be called as witnesses, and (b) the deposition witnesses could be called provided all portions of deposition testimony to be used at trial were designated no later than August 9, 1989. (Appendix 4, pp. 23-26.) The trial court invited the Landowners to make their record, but stated his view that the case could not

[8] The written order subsequently entered lists July 7 (not 11)--ten days after the June 27 hearing. (R. 1210-11; attached as Appendix 6.) Ultimately, after hearing the Landowners' explanation of each proposed witness, the trial court allowed the naming of all but two. (Appendix 4, pp. 15-20.)

go to trial if the August 1, 1989, witness list were to stand unmodified. (Appendix 4, pp. 29-32.)

Before trial ended, the Landowners failed to offer any further information regarding Dr. Shroder's possible testimony. They did not attempt to call Dr. Shroder as a witness either in their case-in-chief or on rebuttal. They made no proffer of his proposed testimony.[9]

ARGUMENT

I. A "POSSIBLE CONTEMPT" STANDARD DERIVED FROM DISCOVERY RULES DOES NOT LIMIT TRIAL COURT DISCRETION IN MAKING CASE MANAGEMENT DECISIONS.

Without citation to the Record, the Court of Appeals denominates the proceedings resulting in the exclusion of witnesses as a "discovery" matter controlled by Utah R.Civ.P. 26 and 37. (Op. 6, 8.)[10] According to the Court of Appeals, these discovery rules prohibit "the imposition of a sanction" without an order that "'brings the offender squarely within possible

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[9] For instance, only after trial, at a hearing on a motion for new trial, did the Landowners first contend that Dr. Shroder was a "world-renowned geomorphologist." (Transcript of January 3, 1990, hearing, excerpted in Appendix 7, p. 8; R. 1563). Ostensibly quoting Dr. Shroder, the Landowners also first disclosed after trial a portion of his tentative opinions: "I warned him [sic] years ago that that railroad could cause a landslide in that area. In my article. And just whereas you've told me, Mr. Young, it sounds like they certainly were a cause. I hate to tell you that without more, so would you send me the information that you have." (Appendix 7, p. 7.)

[10] Later in its opinion, the Court of Appeals appears to acknowledge this by recharacterizing the trial court's exclusion decision as "a case management decision under the rules of civil procedure" and the August 3, 1989 hearing as a "Pre-trial hearing." (Op. 8, 9 and 11.)

contempt of court.'" (Op. 6-7 citing Sexton v. Sugar Creek Packing Co., 38 Ohio App.2d 32, 311 N.E.2d 535, 538 (1973) (emphasis added). This holding is wrong.

As the hearing transcripts reveal, the trial court's exclusion of witnesses was never a discovery issue. Rather, at all times the trial court acted under its inherent powers and Utah R.Civ.P. 16 to manage properly the action before it in preparation of trial. Because the Court of Appeals erroneously perceives the exclusion of Dr. Shroder as limited by the rules of discovery, its abuse-of-discretion analysis is flawed.

A. The Trial Court Excluded Witnesses as a Case Management Decision. Docket management was the trial court's guiding concern as it addressed the Landowners' attempt to continue trial again and the Railroad's requests to learn the identity of witnesses:

> You can't imagine what this would do to this court's calendar to take two weeks now that I can't fill at this late date . . . what you've done is to put at least two weeks of the court's time that's going to be lost or wasted not necessarily wasted, I can find things to do. But it doesn't satisfy the public in getting their cases heard and taken care of. . . .

(Appendix 3, pp. 24-25.)

> And I'm telling you, in my view, it's too late. And that even though they give them an opportunity to depose [Mr. Shroder] next week, then [the Railroad,] they've got to get experts, they've got to get somebody, if they want to counter it, so that you don't have a reasonable opportunity to prepare your case, either side. It seems to me that this is something that ought to have been done a long time ago.

(Appendix 4, p. 16.).

At no time in any of the hearings or at trial was there any mention of Utah R.Civ.P. 26 as the basis for excluding Dr. Shroder. Thus, the Court of Appeals' extensive references to motions to compel, contempt and Rule 26(f) (Op. 6-10) are inapposite; the trial court was managing its docket as Rule 16 allows, not sanctioning discovery abuse. (Appendix 4, pp. 22-31.)

B. Rule 16 Governs Case Management Decisions. Trial courts have broad powers, both inherent and under Utah R.Civ.P. 16(d), to manage their cases. See Committee Note of 1983 to Subdivision (f) of Rule 16 of the Federal Rules of Civil Procedure;[11] In re Baker, 744 F.2d 1438, 1441 (10th Cir. 1984) (en banc) cert. denied, sub nom. Baker v. United States, 471 U.S. 1014 (1985); Goforth v. Owens, 766 F.2d 1533, 1535 (11th Cir. 1985) ("The sanctions contained in Rule 16(f) were designed to punish lawyers and parties for conduct which unreasonably delays or otherwise interferes with the expeditious management of trial preparation"). Rule 16(d) incorporates by reference Rule 37(b)(2) only to identify some of the orders available to a trial court; the standards by which those orders may issue in the pretrial context are governed by the flexible language of Rule 16, not the more restrictive terms of the discovery rules employed by the Court of Appeals.

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[11] Attached as Appendix 8. The sanctions sub-section of the federal rule, which Utah Rule 16(d) tracks, is (f) rather than (d).

Under Rule 16, "[n]either *contumacious attitude nor* chronic failure is a necessary threshold to the imposition of sanctions." Ikerd v. Lacy, 852 F.2d 1256, 1258-59 (10th Cir. 1988) (construing Fed.R.Civ.P. 16). As the United States Court of Appeals for the Tenth Circuit[12] has held:

> While on the whole Rule 16 is concerned with the mechanics of pretrial scheduling and planning, its spirit, intent and purposes is [sic] clearly designed to be broadly remedial, allowing courts to actively manage the preparation of cases for trial . . . We are not dealing here with the historic concept of contempt. We are not dealing with the traditional award of attorney's fees as an adjunct of success in litigation. Nor are we dealing with the defiant refusal of an attorney or party to comply with some order of the court, such as discovery. Instead, we are dealing with a matter most critical to the court itself: management of its docket and avoidance of unnecessary burdens on the tax-supported courts, opposing parties or both.

In re Baker, 744 F.2d at 1440-41. Thus, the Court of Appeals erred by adopting a "possible contempt" standard (Opinion, p. 6) to govern trial court use of case management remedies--including witness preclusion.

From this flawed premise the Court of Appeals erroneously implies that, absent some type of formal written order setting a deadline, the trial court has no power to exclude witnesses. (Op. 9.) Yet, the Federal Rules Advisory Committee has observed that "the violation of a court order" is necessary only to impose a contempt sanction under Rule 16. (Appendix 8.)

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[12]The Utah Supreme Court has previously sought guidance in applying Rule 16 from decisions of the United States Court of Appeals for the Tenth Circuit construing the corresponding federal rule. See Dugan v. Jones, 615 P.2d 1239, 1244 (Utah 1980).

In any event, the Landowners have never claimed that the trial court's June 27 directive did not require witness disclosure or was somehow unenforceable.[13]

The Court of Appeals also mistakenly concluded that the Landowners' counsel could rely on later dates referenced by the Railroad for the disclosure of witnesses[14] and, by so doing, render the trial court's prior directive on disclosure a nullity. (Op. 8.) Even if the Railroad and Landowners had openly agreed to an extension, such an agreement, absent embodiment in a fully executed pretrial order, would have been ineffective. See Hollis v. United States, 744 F.2d 1430, 1432 (10th Cir. 1984) (in considering sanctions for failure to meet court-ordered deadline, an agreement between counsel to extend time for plaintiff to file an amended complaint "was ineffective").[15]

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[13] The Landowner's brief to the Court of Appeals (they filed no reply brief) entirely omits discussion of the trial court's June 27 pretrial hearing.

[14] The Court of Appeals concludes as a central element of its holding that the Landowners "relied upon [the] representations [in the July 12, 1989, Letter] and would be prejudiced by their withdrawal." (Op. 8.) This factual finding is unsupported. The Landowners did not contend at the time the trial court was considering the motion to strike that they "relied" on the contents of the July 12, 1989 Letter in delaying their efforts to contact Dr. Shroder and in failing to name witnesses by July 7, 1989. (Appendix 4.) Such reliance was impossible to establish given that the July 12 Letter dates five days after the trial court-imposed deadline had passed. (Appendix 3, pp. 25-26.)

[15] Moreover, the Court of Appeals' interpretation of the July 12 Letter as a license to name unlimited numbers of new witnesses, if accepted by the trial court at the time, would certainly have required continuance of the trial in defiance of the trial court's express refusal on June 27, 1989, to grant such a continuance.

In summary, the trial court's instructions to counsel and its delineation of the consequences for failure to heed those instructions were unambiguous: failure to name witnesses would result in exclusion. (Appendix 3, pp. 28-29). Later, when faced with seventy-eight new witnesses (including Dr. Shroder) two weeks before trial, the trial court acted within its discretion in excluding witnesses not timely identified as the trial court's "order" directed. (Appendix 4, p. 23.) See Bertram v. Harris, 423 P.2d 909, 916-18 (Alaska 1967) (no abuse of discretion under Rule 16 to exclude late-named witness in violation of order issued following pre-trial conference). Cf., Child v. Salt Lake City, 575 P.2d 195, 197 (Utah 1978) (trial court's exercise of discretion should be disturbed only if it is "arbitrary, capricious, or unreasonable"). The Court of Appeals' decision, which would fetter trial court discretion to cases of "possible-contempt" in imposing case management sanctions, is simply wrong. See Ikerd, 852 F.2d at 1258-59.

II. THE COURT OF APPEALS, BY PRESUMING PREJUDICE IN ANY ERROR RESULTING FROM THE EXCLUSION OF DR. SHRODER, ERRONEOUSLY RELIEVED THE LANDOWNERS OF THE BURDEN OF DEMONSTRATING PREJUDICE.

Even if it could be said that the trial court abused its discretion (and it did not), the Court of Appeals misstated and misapplied the law of Utah regarding harmless error based on dicta in Joseph v. W.H. Groves Latter-Day Saints Hosp., 7 Utah 2d 39, 318 P.2d 330, 334 (1957). See Utah R.Civ.P. 61. To the extent the Court of Appeals relies upon Joseph to allocate to the

Railroad, the objecting party, the burden of establishing prejudicial error, this Court should expressly disavow or reverse that decision. (Op. 11.)

The Court of Appeals correctly states the Rule 61 standard: "If a trial court erroneously excludes a witness, we will reverse if the error was prejudicial to the substantial rights of a party." (Op. 4.) Further, the Court of Appeals agrees that the Landowners failed to make any proffer of Dr. Shroder's testimony from which a determination of prejudice might be made. (Op. 9.)[16] Problems with the Court of Appeals' analysis begin when the court concludes that the absence of a proffer is no problem because the exclusion of Dr. Shroder was not an "evidentiary ruling" and "[t]he failure to proffer . . . does not preclude an appeal of a case management decision." (Op. 9.)[17] As a consequence, the court reasons, one need only look to the Railroad's objection to Dr. Shroder's testimony for

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[16] Inasmuch as the Court of Appeals acknowledges that the Landowners made no proffer of Dr. Shroder's testimony (Op. 9), it is puzzling to read subsequently: "Dr. Shroder's testimony . . . would have indicated that the slide was caused by defendant's cuts at the toe of the slide. . . ." (Op. 11.) Nothing in the Record supports this characterization of what Dr. Shroder might have said.

[17] The Court of Appeals also places great emphasis on the Railroad's supposed knowledge of Dr. Shroder's "geomorphological credentials," implying that the Railroad was somehow acquainted with what this witness might say. (Op. 11.) While it is undisputed that all parties knew of Dr. Shroder's early writings from almost the inception of the action, there was no mention of his "geomorphological credentials" (a characterization unverified to this day) until the hearing on the post-trial motion for new trial in January 3, 1990. (Appendix 7, p. 7.) In fact, neither the word "geomorphologist" nor its equivalent is to be found in any of the pretrial transcripts.

"[s]ome indication of the importance of the error . . . ." (Op. 11 citing Joseph, supra.) Finding in this objection a reason to "doubt" the absence of prejudice, the Court of Appeals resolves that "doubt" in favor of the Landowners and finds that the exclusion of Dr. Shroder's testimony "was prejudicial." Id. This goes too far.

The Court of Appeals disregards Rule 61 and its application as embodied in the procedures of Utah R.Evid. 103(a)(2). The latter states: "Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer. . . ." Utah R.Evid. 103(a)(2). This provision is comprehensive; it applies to all rulings which exclude evidence, without distinction between rulings premised on other rules of evidence and those premised on disregard for the court's pretrial directives. Utah R.Evid. 103(a).

The United States Court of Appeals for the Tenth Circuit in United States ex rel. Leonard Tire Co. v. Rayco, Inc., 616 F.2d 462 (10th Cir. 1980) (excluding documentary evidence), addressed this issue in an analogous context, remarking that:

> [T]he trial court could not have determined that any injustice would result, because [the defendant] did not tender the document, make an offer of proof, or provide the court with any indication of the document's importance. See Fed.R.Evid. 103(a)(2). Further, since it is not part of the record, we also are unable to determine that the contents of the exhibit were so central to [the defendant's] case that its exclusion prevented examination of the real issues. . . . The

> court's specific warning that dire consequences would follow the failure to submit an exhibit list makes us unsympathetic to [the defendant's] belated claim that its most critical piece of evidence was mistakenly overlooked during trial preparation.

616 F.2d at 464. This is consistent with Utah decisions involving the essential nature of a proffer under Rule 103(a)(2) and its predecessor, Rule 5. See State v. Rammel, 721 P.2d 498, 499-500 (Utah 1986); Bradford v. Alvey & Sons, 621 P.2d 1240, 1243 (Utah 1980); Downey State Bank v. Major-Blakeney Corp., 578 P.2d 1286, 1288 (Utah 1978).

The proffer has as its purpose to inform the appeals court sufficiently to make a determination whether, had the evidence been admitted, "there is any reasonable likelihood that there would have been a different result at the trial." Bradford, 621 P.2d at 1243. There is no suggestion in the cases that the Rule 103 phrase "a ruling which admits or excludes evidence" is so limited as not to include an exclusionary ruling based on non-disclosure of witnesses.

The Court of Appeals' decision, which relies only on dicta from the 1957 Joseph case (Op. 10-11), is counterintuitive both as a fact conclusion and a procedural guide. The Railroad objected, not just to the testimony of Dr. Shroder, but to the testimony of all seventy-eight new witnesses. (Appendix 5.) Thus, there is no basis for the Court of Appeals' presumption that the Railroad's blanket objection transformed Dr. Shroder's undisclosed (and, to this day, universally unknown) proposed

testimony into evidence that could materially affect the result at trial.

In broader application, the Court of Appeals' rule results in an absurdity. Under Rule 103(a)(1), the Railroad must object in order to preserve its rights and take an appeal. Yet, if the Railroad objects, the Court of Appeals now deems the objection an admission that the evidence could substantially effect the result at trial. (Op. 10-11.) "Doubt" as to the effect of the excluded evidence must now be resolved in favor of the proponent of the evidence. (Op. 11-12.) Therefore, to preserve its right of appeal, the Railroad is now required to take action that will ultimately render any error prejudicial and reversible. The only conceivable way for any objecting party to avoid this result would be to take a deposition and make its own proffer of the evidence it seeks to exclude. The rules do not mandate or intend such absurd results.

The straightforward allocation of burden and responsibility outlined in Rule 103 is intended to avoid such dilemmas. The party resisting the offer of evidence has the burden, in the first instance under sub-section (a)(1), to object for the record. If the objection is sustained, then under sub-section (a)(2) the offering party must make an offer of proof for the record. Neither party is presumed by its actions to have affirmed the position of the other or is called upon to preserve the evidence for another. Only in this fashion is the appellate court left with an adequate record to consider on appeal.

CONCLUSION

For the above reasons, the Supreme Court should review these two important questions.

DATED this 4th day of May, 1992.

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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI to be mailed, postage prepaid, this 4th day of May, 1992, to the following:

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